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Supreme Court, U.S.
FILED

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No._____

In The

SUPREME COURT OF THE UNITED STATES

James E. Anderson and Cheryl J. Latos
Petitioners

v.

United States of America

On Petition for Writ of Certiorari To The
United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

James E. Anderson
Cheryl J. Latos
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34 pp

QUESTIONS PRESENTED

1. Whether the Internal Revenue Service Reform and Restructuring Act of 1998 requires the Internal Revenue Service to follow all statutes and procedures for the collection of Federal Insurance Contribution Act (FICA) taxes.

2. Whether the Internal Revenue Service must collect the employee's share of FICA tax from the employer or may instead collect the tax directly from the employee.

LIST OF PARTIES

The parties to the proceedings before the United States Court of Appeals for the First Circuit were James E. Anderson and Cheryl J. Latos, petitioners; Eileen J. O'Connor, Assistant Attorney General; Kenneth L. Greene and A. Wray Muoio, Attorneys, Tax Division, Department of Justice, Post Office Box 502 Washington, DC 20044.

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(United States v. W. M. Webb, Inc., 397 U. S. 179, 25 L. Ed. 2d 207, 90 S. Ct. 850, 1970); p. 5

MISCELLANEOUS

IRC § 3102 p. 1,5,7
IRC § 6330 p. 1,3,4,6,8, 9
Treas. Regs. § 31.3102-1 p. 1,4,5,6,7
Tres. Reg § 31.6205-1 P. 1,5,7

Senate Report 105-174 p. 4
Senate Report 105-599 p. 6

OPINIONS

The opinion of the Court of Appeals (App., *infra*, p. 1a) is reported at 89 AFTR 2d 1496 (1st Cir. 2002). The order of the district Court is unreported (App. *infra*, p. 4a). The order of the Tax Court is reported at T.C. Memo. 2000-311.

JURISDICTION

The order of the District Court was entered on July 30, 2001. The judgment of the Court of Appeals was entered on March 14, 2002. The petition for a panel rehearing and suggestion for rehearing en banc was denied on July 8, 2002 (App., *infra*, p. 7a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1)

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant portions of section 3102 and 6330 of the Internal Revenue Code, and Treas. Reg. §§31.3102-1 and 31.6205-1, are set forth in the appendix, *infra*, pp. 9a-18a.

STATEMENT OF THE CASE

Petitioner James Anderson, a commercial fisherman, had been determined to be an employee for tax purposes at an IRS Appeals hearing held in 1992. The IRS treated him as an employee for tax year 1993.

The Petitioners were issued a Statutory Notice of Deficiency dated May 22, 1996 for an IRS assessment of self-employment taxes on the earnings of the petitioner for tax year 1994. Taxpayers requested an Appeals hearing to dispute the self-employment tax assessment. The Notice of Deficiency was rescinded on August 20, 1996. An Appeals hearing was held in early 1997. On March 26, 1997, the Appeals officer issued taxpayers agreement form 870-AD for a reduced assessment of income taxes. No statutory notice of deficiency was issued for the new assessment after the Appeals hearing in 1997.

On April 14, 1997, the Connecticut-Rhode Island Appeals Office issued petitioners a denial of their request for technical advice on the petitioner's employment status, reaffirming their decision to treat the petitioner as an employee for tax purposes.

Petitioners received the Notice of Intent to levy dated February 3, 1999 for the assessment of a 1040 tax for tax year 1994. Taxpayers timely filed a request for a Collection Due Process (CDP) hearing. The CDP hearing was held on April 30, 1999.

The Notice of Determination issued on October 29, 1999 informed taxpayers that the proposed collection enforcement action was appropriate.

Petitioners filed suit in Tax Court to dispute the collection of the income/1040 tax. The Tax Court determined that the assessment for 1994 was for Federal Insurance Contribution Act (FICA) taxes, not income taxes, and dismissed taxpayers petition for lack

of jurisdiction. (Anderson v. Commissioner, T.C Memo. 2000-311).

Petitioners timely filed a petition in the U. S. District Court for the District of Rhode Island. The Government filed a motion for Summary Judgment affirming the IRS determination for the collection of taxes on the grounds that there was an adequate basis in law for the conclusions reached by the CDP Appeals Officer. The Government's motion was granted after a hearing on July 30, 2001.

Petitioners timely filed an appeal in the United States Court of Appeals for the First Circuit. On March 14, 2002, issued an unpublished opinion affirming the decision of the District Court. Petitioners timely filed a petition for panel rehearing and suggestion for rehearing en banc. That petition was denied on July 8, 2002.

REASONS FOR GRANTING THE PETITION

The Internal Revenue Service Reform and Restructuring Act of 1998 granted taxpayers the right to a fair hearing before the IRS levies their property IRC § 6330. The Collection Due Process (CDP) hearing officer is required to verify that all statutory, regulatory, and administrative requirements for the proposed collection action have been met. IRC § 6330(c)(1). The CDP hearing officer failed to provide petitioners with any statutory authorization for the proposed collection action at the CDP hearing or in the Notice of Determination, Attachment 3194, issued to petitioners after the hearing (App., *infra* , p. 5a).

At trial in the U.S. District Court, respondent claimed that Treasury Regulation § 31.3102-1(c) authorizes the collection of FICA taxes directly from the employee. The district court concurred, and the U. S. Court of Appeals for the First Circuit affirmed the lower court's decision. Although petitioners provided evidence that the proper procedures for the assessment of FICA tax were not followed. (App., *infra,* p. 19a) both courts ignored respondent's failure to adhere to the requirements of IRC 6330(c)(1).

1.a) IRC 6330(c)(1) requires the CDP hearing officer to obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

Neither the law, nor the legislative history, limits the verication process to administrative actions of IRS collection department employees. Congress required the IRS "to verify that all statutory, regulatory, and administrative requirements for the proposed collection action have been met . . . A proposed collection action should not be approved solely because the IRS shows that it has followed appropriate procedures." Senate Report 105-174, 68, Mesa Oil Ibc., v. U.S., 86 A.F.T.R. 2d 7312 (D. Colo. 2000).

Petitioners were assessed self-employment tax for 1994. At the conclusion of an Appeals hearing for that assessment, petitioners were issued issued Form 870-AD for an income tax deficiency

The Federal Insurance Contributions Act (FICA) imposes a tax on employees IRC § 3101. The tax imposed is collected from the employee by the

employer by deducting the tax from employee wages when paid. An employer required to deduct the tax shall be held liable for the payment of the tax. IRC § 3102, Treas. Regs. §§ 31.3102-1 and 31.6205-1. United States v. Energy Resources Co., 495 U.S. 545 (1990); Beiger v. IRS, 496 U.S. 53 (1990); Rowan Cos. V. United States, 452 U.S. 247 (1981); Slodov v. United States, 436 U.S. 238 (1978); United States v. Sotelo, 436 U.S. 268 (1978) Otte v. United States, 419 U.S. 43 (1974).

The Employment Tax Handbook affirms employer liability for employment taxes except when Section 530 of the Revenue Act of 1978 or IRC § 3509 apply. Internal Revenue Manual (IRM) 4.23.7.2; 4.23.7.5.

The IRS Appeals office issues Form 2504 to adjust employee FICA tax. Form 870-D is used for the assessment of income, and self-employment, taxes. Appeals Agreement Forms, IRM 8.8.1.1.2; Employment Tax Handbook, IRM 4.23.9.12.

Captains and crew of fishing vessels are employees of the vessel owner (United States v. W. M. Webb, Inc., 397 U. S. 179, 25 L. Ed. 2d 207, 90 S. Ct. 850, 1970); Fishing boat captains and crew are considered self-employed for tax purposes only if their service is defined by IRC § 3121(b)(20).

IRC § 3509 does not apply to an error in interpreting "employment" under IRC § 3121(b). IRM [104.6] 8.7; Flamingo Fishing Corp, et al., v. the United States, 32 Fed. Cl. 377 (1994); 74 A.F.T.R. 2d (RIA) 7197.

A worker is determined to be an employee under IRC section 3121(d) for section 530 to apply. IRM [104.6] 5.4.

b) The Notice of Determination failed to conform to the requirements of IRC § 6330 (c)(3)

The written determination prepared by the Appeals officer conducting the CDP hearing shall take into consideration the verification that the requirements of any applicable law or administrative procedure has been met and address the issues presented by the taxpayer and considered at the CDP hearing, including challenges to the appropriateness of the collection action. IRC § 6330 (c)(3); Senate Report 105-599, 266.

The Notice of Determination Petitioners received (App) states that "the only legal requirements before general enforcement action are that notice and demand has been issued and that notice of intent to levy and of the right to a collection due process hearing has been issued.." The Notice of Determination did not take into consideration the requirements of verification nor did it address the issues raised by the taxpayers at the CDP hearing.

2. The Court of Appeals for the First Circuit departed from the accepted and usual course of judicial proceedings in the granting of deference to the Respondent's interpretation of Treas. Reg. § 31.3102-1(c).

Simply put, the Court chose to ignore the statutory scheme for the collection of FICA tax. and refused to follow the established guidelines set down by this Court for the granting of deference to agency regulations and agency interpretations thereof. United States v. Mead Corp., 533 U. S. 218, 230-231 (2001); Chevron U.S.A. v. Natural Resources Defense

Council, Inc., 467 U.S. 837(1984); Rowan Cos. v. United States, 452 U.S. 247 (1981); United States v. Sotelo, 436 U.S. 268 (1978).

In Rowan, this court noted Congress' intent to coordinate the income tax withholding system with FICA "to promote simplicity and ease of administration." 452 U.S. 247, 257. IRC § 3402 requires every employer making payment of wages deduct and withhold employee income tax. IRC § 3403 holds the employer liable for the payment of the tax required to be deducted and withheld; Treas. Reg. 31.3403-1 holds every employer required to deduct and withhold the tax under section 3402 from the wages of an employee liable for the payment of such tax whether or not it is collected from the employee by the employer. IRC §§ 6672, 7202, 7501, and Treas. Reg. § 31.6205-1 support the statutory scheme of collection of employment taxes at source.

The Appeals Court failed to point to any statute or language in the code for support of its position or to provide any legal analysis for its decision to afford the usual deference to the IRS interpretation of Treas. Reg.§ 31.3102-1(c). The Respondent did not argue, nor did the lower courts rule, that the language of IRC § 3102 was ambiguous, unclear, not plain, silent on the issue of liability for the collection and payment of FICA tax, or contrary to the intent of Congress.

The Appeals Court decreed that the IRS has rule-making authority for the collection of FICA tax based on its reading of United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001), wherein the court acknowledged that the IRS "has long maintained

regulations interpreting the FICA and FUTA tax regulations." However, this Court also stated that "it defers to the Commissioner's regulations as long as they implement the congressional mandate in a reasonable manner.," see also United States v. Cartwright, 411 U.S. 546, 550 (1973) ("that principle is to set the framework for judicial analysis; it does not displace it.")

3. Necessity for review.

The appellants were granted the right to judicial review of the IRS decision to proceed with collection by IRC § 6330(d)(1). Reviewing courts shall hold unlawful set aside agency action found to be arbitrary, capricious, or contrary to law.5 U.S.C § 706 (2)(A).

This court has ruled that reviewing courts must reject administrative decisions that are inconsistent with statutory mandate or frustrate Congressional intent. Securities Industry Assn. v. Board of Governors, 468 U.S. 137 (1984); FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); Labor Board v. Brown, 380 U.S. 278 (1965); Caminetti v. U S , 242 U.S. 470 (1917).

In this case, both the district Court and the Appeals Court deferred to the agency's interpretation of a statute without following the guidelines established for granting deference to agency regulations. Automatic deference to agency regulations abrogates taxpayers' newly acquired rights to judicial review of IRS collection actions. Brown v. Gardner, 513 U.S. 115 (1994). If the ruling is allowed to stand, challenges to

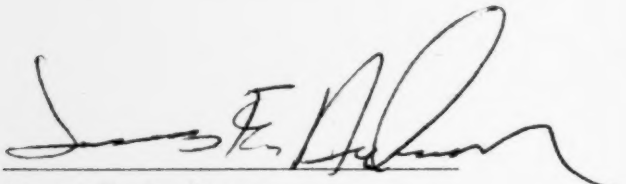
agency regulations and actions under IRC § 6330 will be barred.

The matter of adherence to IRC § 6330(c) is of exceptional national importance. If the panel's decision is allowed to stand, this Court would have voided the mechanism for securing the taxpayer's right to a fair hearing under the newly enacted law.

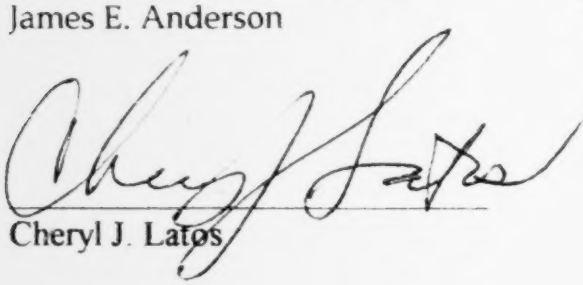
CONCLUSION

This petition must be granted to allow this court to establish guidelines for the judicial review of IRS collection decision that Congress has mandated with the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998.

Respectfully submitted,



James E. Anderson



Cheryl J. Latos

Date: October 1, 2002